The nexus between Common Commercial Policy and Human Rights: Implications of the Lisbon Treaty

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Abstract

This contribution analyses the implications of the Treaty of Lisbon for the nexus between the EU's Common Commercial Policy (CCP) and the protection of human rights. It is argued that the innovations of the Lisbon Treaty significantly affected the law and practice of the CCP in the sense that human rights considerations have become an integral part of the EU's trade policy. This is reflected both at the procedural level, with the practice of human rights impact assessments as a clear example; at the judicial level, with the Charter of Fundamental Rights as a key point of reference for assessing the legality of the EU's external action; and at the practical level, with the introduction of new initiatives and mechanisms aiming at the promotion of respect for human rights in the framework of the CCP.

Keywords

Trade agreements, Charter of Fundamental Rights, impact assessments, conditionality, ISDS

1. Introduction

The use of trade instruments for the promotion of non-trade objectives, including respect for human rights, pre-dates the entry into force of the Lisbon Treaty.[1] Typical examples concern the inclusion of so-called "essential element clauses" in bilateral trade agreements,[2] the application of human rights conditionality within the context of the EU's system of generalised preferences for developing countries (GSP+)[3] and the establishment of human rights dialogues

[1] It is noteworthy that the early case law of the ECJ already confirmed that non-economic objectives could fall within the scope of the CCP. See e.g. Opinion 1/78 *Natural Rubber*, EU:C:1979:224; Case C-45/86, *Tariff Preferences*, EU:C:1987:163, para. 19-20; Case C-70/94, *Werner*, EU:C:1995:328, para. 10; Case C-124/95, *Centro Com*, EU:C:1997:8.

[2] Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, COM (95) 216 final, 23 May 1995.

[3] S. Velluti, 'Human Rights Conditionality in the EU GSP Scheme: A Focus on Those in Need or a Need to Refocus?', in N. Ferreira and D. Kostakopoulou (eds.), *The Human Face of the European Union. Are EU Law and Policy Humane Enough?* (CUP, 2016), p. 342-366. The EU's GSP scheme is discussed in Chapter X in this Volume.

as part of the broader framework of bilateral relations with third countries.[4] Whereas the EU's common commercial policy (CCP) has thus never been "apolitical", the Lisbon Treaty strengthened the link between trade and human rights in several aspects.

First, the nexus between CCP and human rights is now firmly anchored in the EU's primary law. Of particular significance is the provision in Article 207 TFEU that "[t]he common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action". The latter, enshrined in Articles 3 (5) and 21 TEU, explicitly refer to respect for and promotion of human rights. Even though the precise meaning of the partly overlapping provisions may be subject to discussion, it is obvious that the integration of human rights in EU external trade relations is a constitutional obligation and not a mere policy choice.

Second, the Lisbon Treaty shifted the institutional balance in the CCP. In particular, the European Parliament acquired the power to give or withhold consent to trade agreements (Article 218 (6) (a) TFEU) whereas it only used to be consulted on trade deals in the past. Moreover, the Parliament is to be kept informed about the progress of trade negotiations (Article 207 (3) TFEU) and acts as a co-legislator with the Council under the ordinary legislative procedure for the adoption of measures defining the framework for implementing the CCP.[5] On several occasions, the European Parliament underlined its ambition to safeguard the strong connection between trade and human rights in the conduct of its activities.[6]

Third, the integration of the EU Charter of Fundamental Rights in EU primary law strengthened the EU's commitment to the protection of human rights. In this respect, it is noteworthy that the term "fundamental rights" is used within the specific context of the EU legal order whereas the term "human rights" derives from international law. However, there is a significant overlap in terms of substance as can be derived from a comparison between the content of the Charter and the core UN conventions on human rights.[7] Moreover, as can be derived from Article 6 TEU, the protection of fundamental rights in the EU legal order consists of different, partly overlapping, layers including the Charter of Fundamental Rights,

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[4] Guidelines on human rights dialogues with third countries: https://eeas.europa.eu/headquarters/headquarters-homepage_en/6987/EU%20Human%20rights%20guidelines.

[5] On the role of the European Parliament in the CCP, see Chapter X in this Volume.

[6] See e.g. A7-0312/2010, Report on Human rights and social and environmental standards in international trade agreements. On the role of the European Parliament and its influence on the EU's trade agenda, see also: F. Hoffmeister, 'The European Union as an International Trade Negotiator', in J. Koops and G. Macaj (eds.), *The European Union as a Diplomatic Actor* (Palgrave Macmillan, 2015), p. 144-146.

[7] On this terminological distinction, see: European Commission, 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives': http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf, p. 3.

the European Convention for the Protection of Human Rights and Fundamental Freedoms and the constitutional traditions common to the Member States.

The aim of the contribution is to analyse the impact of the identified normative changes for the law and practice of the CCP in the post-Lisbon era. After an analysis of the evolution of the general policy framework, in particular as far as the introduction of human rights impact assessments is concerned, the relevant case law of the Court of Justice will be scrutinised. Particular attention will be devoted to the discussion surrounding the extraterritorial application of the Charter of Fundamental Rights and the legal obligations of the EU institutions in the framework of trade agreements with third countries. Finally, the challenges surrounding the effective enforcement of human rights clauses and social norms in EU Free Trade Agreements will be tackled.

Accordingly, it will be argued that the innovations of the Lisbon Treaty significantly affected the CCP in the sense that human rights considerations have become an integral part of the EU's trade policy. This is reflected both at the procedural level, with the practice of human rights impact assessments as a clear example; at the judicial level, with the Charter of Fundamental Rights as a key point of reference for assessing the legality of the EU's external action; and at the practical level, with the introduction of new initiatives and mechanisms aiming at the promotion of respect for human rights in the framework of the CCP.

2. Policy Impact of the Lisbon Treaty: The Practice of Human Rights Impact Assessments

The constitutionalisation of the trade-human rights nexus significantly affected the EU's policy documents related to the implementation of the CCP. In 2010, the European Commission Communication *Trade, Growth and World Affairs* already emphasised the ambition to use trade policy as an instrument in order "to encourage our partners to promote the respect of human rights, labour standards, the environment and good governance".[8] The subsequent Joint Communication of the European Commission and the EU High Representative for Foreign Affairs and Security Policy, entitled *Human Rights and democracy at the heart of EU external action – towards a more effective approach*, confirmed the "mainstreaming" of human rights and democratisation as a horizontal objective permeating all the EU's actions. This implies, amongst others, that "[t]he human rights situation in the partner country should be considered when the EU decides whether or not to launch or conclude FTA negotiations".[9]

[8] COM (2010) 612, p. 15.
[9] COM (2011) 886, p. 12.

The 2012 EU Strategic Framework and Action Plan on Human Rights and Democracy provided the first attempt to operationalise the EU's commitment under Article 3 (5) TEU.[10]

The envisaged measures *inter alia* concerned the development of a methodology "to aid consideration of the human rights situation in a third country in connection with the launch or conclusion of free trade and/or investment agreements", the reinforcement of human rights dialogues with FTA partners, the inclusion of human rights considerations in the unfolding EU investment policy and a revision of the CFSP Common Position on arms export and the Regulation on trade in goods which can be used for capital punishment or torture. Subsequent policy documents reiterated and reinforced the values dimension of the EU's trade policy. For instance, the 2015 *Trade for all* strategy explicitly defined the promotion of sustainable development, human rights and good governance as a key pillar of the CCP.[11]

Whereas the Lisbon Treaty thus provided new impetus to the policy framework of the trade-human rights nexus, the implementation of this ambitious framework faced significant legal and political challenges. A good illustration concerns the discussion surrounding the failure of the European Commission to conduct a specific human rights impact assessment (HRIA) in anticipation of the conclusion of a Free Trade Agreement (FTA) with Vietnam. In the Commission's view a separate HRIA concerning the FTA with Vietnam was unnecessary taking into account that the negotiations with Vietnam were taking place under the legal framework established for the ASEAN free trade negotiations. The latter had started before the entry into force of the Lisbon Treaty. It further argued that a standalone HRIA would be against the established integrated approach, implying that economic, social, environmental and – as of 2011 – human rights impacts are considered side by side. Moreover, the Commission pointed at the existence of other human rights instruments such as human rights clauses in the Partnership and Cooperation Agreement (PCA) with Vietnam, the enhanced human rights dialogue as well as public statements and foreign policy *démarches.*[12] These arguments could not convince the European ombudsman, who concluded that the Commission's refusal to carry out a HRIA constituted an example of maladministration. While acknowledging that "there appears to be no express and specific legally binding requirement to carry out a human rights impact assessment concerning the relevant free trade agreement", she took the view

[10] Council of the EU, Doc. 11855/12.
[11] European Commission, 'Trade for all. Towards a more responsible trade and investment policy', October 2015: http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf.
[12] European Ombudsman, Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement: https://www.ombudsman.europa.eu/en/decision/en/64308, para. 5.

that such an obligation can be derived from the spirit of Article 21 (1) TEU and Article 21 (2) (b) TEU in conjunction with Article 207 TFEU.[13]

The Ombudsman closed her inquiry with a critical remark concerning the Commission's approach without drawing any further conclusions, particularly because the analysis of human rights impacts in impact assessments for trade-related policy initiatives has now become a standard practice. In response to the 2012 Strategic Framework on Human Rights and Democracy (cf. *supra*), DG Trade has developed a set of relevant guidelines for this purpose. Moreover, the Commission's Better Regulation package also includes a specific tool regarding fundamental rights and human rights.[14] In this context, the impact of proposed trade-related policy initiatives is assessed against the normative framework of the EU Charter of Fundamental Rights and a number of international sources. Significantly, the Commission guidelines entail a broad definition of the scope and depth of the analysis, including "the potential impact of the proposed initiative on human rights in both the EU and the partner county/ies" with respect to "civil, political, economic, social, cultural and core labour rights".[15] Moreover, in the case of negotiations of major trade and investment agreements, Sustainability Impact Assessments (SIAs) are undertaken in parallel with the negotiations and allow the Commission to conduct an extended analysis of the potential human rights impacts. This involves an extensive consultation of stakeholders, including those in the partner country/ies.[16]

Whereas this practice reveals the increased attention to the trade-human rights nexus in the post-Lisbon era, several questions remain concerning the precise implications of the HRIAs for the conduct of the CCP. For instance, the ombudsman firmly stated that "when negative impacts are identified, either the negotiated provisions need to be modified or mitigating measures have to be decided upon before the agreement is entered into."[17] The Commission, on the other hand, does not envisage such far-reaching implications. It rather sees the HRIAs as a tool to inform policy-makers about the potential impacts of the different options under consideration:

> An impact assessment should verify the existence of a problem, identify its underlying causes, assesses whether EU action is needed, and analyse the advantages and

[13] *Ibid.*, para. 11.
[14] See TOOL #28: https://ec.europa.eu/info/better-regulation-toolbox_en.
[15] Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives (n. 7), p. 5.
[16] *Ibid,* p. 6.
[17] European Ombudsman (n. 12), para. 25.

disadvantages of available solutions. *It is not intended to pass a judgment on the actual human right situation in a country nor to decide whether a country is eligible for a trade agreement.*[18]

In other words, whereas the duty to conduct HRIAs in relation to trade-related policy initiatives may be regarded as a procedural obligation stemming from the combined reading of Article 207 TFEU and Articles 3 (5) TEU and 21 TEU, the substantive obligations are less evident. In particular, the question remains to what extent human rights considerations can be balanced with other interests. May certain negative impacts on human rights be compensated by gains in other areas, for instance the creation of job opportunities thanks to economic growth, or the introduction of cleaner technologies in a country allowing for progress in relation to sustainable development?[19] Arguably, the principle that the EU institutions enjoy a wide margin of discretion in areas which involve political, economic and social choices and in which it is called upon to undertake complex assessments is relevant in this respect.[20] This margin of discretion also applies in the field of external economic relations.[21] It follows that judicial review is limited to the question whether the competent EU institutions made "manifest errors of assessment".[22] As argued by the General Court in the *Frente Polisario* case, this implies that the assessment is to be based on a careful and impartial analysis of all relevant facts of an individual case, with facts supporting the conclusion reached.[23]

3. The Trade-Human Rights Nexus before the Court of Justice and the External Dimension of the EU Charter of Fundamental Rights

The EU's duty to take into account fundamental rights when it acts in the area of its external policies, including the CCP, is confirmed in the case law of the EU Court of Justice (ECJ). In the *Air Transport Association of America (ATAA)* case, the Court derived from Article 3 (5) TEU an obligation for the EU "to observe international law in its entirety, including customary

[18] Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives (n. 7), p. 2.
[19] O. De Schutter, 'The implementation of the Charter of Fundamental Rights in the EU institutional framework', Study for the AFCO Committee, 2016, p. 60.
[20] See e.g. Case C-72/15, *Rosneft*, para. 146; Case C-348/12 P, *Council v Manufacturing Support & Procurement Kala Naft*,EU:C:2013:776, para. 120.
[21] See e.g. Case T-572/93, *Odigitria* v *Council and Commission*, EU:T:1995:131, para. 38; Case T-512/12, *Frente Polisario v. Council*, EU:T:2015:953, para. 164.
[22] Case T-512/12, *Frente Polisario v. Council*, EU:T:2015:953, para. 224.
[23] *Ibid*., para. 225.

international law".[24] Whereas the precise scope of international customary law in relation to human rights is subject to discussion, the Universal Declaration of Human Rights (UDHR) and the core human rights conventions used for the GSP+ system constitute an important source of reference.[25] Of course, as also observed by the Court in ATAA, "since a principle of customary international law does not have the same precision as a provision of an international agreement, judicial review must necessarily be limited to the question whether, in adopting the act in question, the institutions of the European Union made manifest errors of assessment concerning the conditions for applying those principles."[26]

Hence, apart from the EU's obligations with respect to the observance of (customary) international law, the EU Charter of Fundamental Rights (CFR) constitutes a crucial source of reference. As observed in the Commission's guidelines on human rights impact assessments, respect for the CFR is "a binding legal requirement in relation to both internal and external policies."[27] In other words, the CFR has certain extraterritorial implications in the sense that it applies in relation to all EU activities irrespective of whether they take place within or outside its territorial boundaries. In this respect, it has been argued that the CFR differs from other human rights treaties, most notably the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), which usually contain a specific clause delimiting their application to acts with the State Parties' jurisdiction.[28] Article 51 (1) of the Charter defines its field of application in relation to its addressees, i.e. the institutions, bodies, offices and agencies of the Union and the Member States when they are implementing Union law, and in connection to the powers of the EU as conferred on it in the Treaties. It does not entail any reference to the territorial scope of application, implying that the obligations of the Charter apply whenever the EU acts. Hence, as observed by Moreno-Lax and Costello, "The key question is not whether the Charter applies territorially or extraterritorially, but whether a particular situation falls to be governed by EU law or not".[29] Or, to use the metaphor of Koen Lenaerts and Gutierrez-Fons, "the Charter is the 'shadow' of EU law. Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter".[30]

[24] Case C-366/10, *ITAA*, EU:C:2011:864, para. 101.
[25] V. Kube, 'The European Union's External Human Rights Commitment: What is the Legal Value of Article 21 TEU?', *EUI Department of Law Research* Paper, No. 2016/10, p. 20.
[26] Case C-366/10, *ITAA*, EU:C:2011:864, para. 110.
[27] Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives (n. 7), p. 5.
[28] See Art. 1 ECHR.
[29] V. Moreno-Lax and C. Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity: the Effectiveness Model', in S. Peers et. al. (eds.), *Commentary on the EU Charter of Fundamental Rights* (Hart, 2014), p. 1682.
[30] K. Lenaerts and J.A. Gutierrez-Fons, 'The place of the Charter in the EU Constitutional Edifice', in S. Peers et. al. (eds.), *Commentary on the EU Charter of Fundamental Rights* (Hart, 2014), p. 1568.

The view that the Charter applies in relation to the EU's external policies seems supported by the case law of the ECJ. In *Mugraby*, a Lebanese applicant claimed that the Council and the Commission failed to suspend economic aid programmes under the human rights clause in the EU-Lebanon Association Agreement. Whereas the action failed, essentially in light of the institutions' broad margin of discretion in the management of the EU's external relations, it is noteworthy that neither the General Court nor the Court of Justice questioned the extraterritorial application of the EU Charter of Fundamental Rights.[31] A more explicit reference to the role of the Charter in relation to the EU's external trade relations occurred in the *Frente Polisario* case. In this case, the *Frente Polisario* sought the annulment of the EU Council decision approving the agreement concerning the progressive liberalisation of trade in agricultural and fisheries products.[32] In support of its action, the applicant set out not less than eleven pleas which all directly or indirectly touched upon the EU's commitments to respect the right to self-determination of the people of the Western Sahara and the rights which derive from it.

After recalling the settled case law concerning the EU institutions' wide discretion in the field of external economic relations, the General Court pointed at the EU's human rights obligations. Even though it found that there is "no absolute prohibition on concluding an agreement which may be applicable on disputed territory, the fact remains that the protection of fundamental rights of the population of such a territory is of particular importance and is, therefore, a question that the Council must examine before the approval of such an agreement".[33] In particular, the Council is bound "to examine, carefully and impartially, all the relevant facts in order to ensure that the production of goods for export is not conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights".[34] Significantly, the Court referred to a wide range of Charter rights thus confirming the latter's extraterritorial application. Whereas it agreed with the Council that the EU cannot be held responsible for actions committed by Morocco, this does not erase the EU from its obligation to prevent that it indirectly encourages a third country's human rights violations or profits from them by allowing the export to its Member States of products which have been produced or obtained in conditions which do not respect the fundamental rights of the population of the territory from which they originate.[35] For this purpose, the Council

[31] L. Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effect', *European Journal of International Law* (2014) 25 (4), p. 1076 and Kube *(*n. 25), p. 25.
[32] Case T-512/12, *Front Polisario v. Council,* EU:T:2015:953.
[33] *Ibid*., para. 227.
[34] *Ibid.*, para. 228.
[35] *Ibid.*, para. 231.

should have examined that there was no risk and could not simply conclude that it was for the Kingdom of Morocco to ensure that the rights of the Sahrawi population are guaranteed.[36] In other words, the General Court views the existence of a human rights impact assessment prior to the adoption of the Council decision as a crucial procedural requirement.

In his opinion in the appeal procedure, Advocate General Wathelet agreed with the requirement of a human rights impact assessment but explicitly dismissed the General Court's reliance on the provisions of the Charter of Fundamental Rights. In his view, Article 51 of the Charter does not allow for an extraterritorial effect, unless an activity is "governed by EU law and carried out under the effective control of the EU and/or its Member States outside their territory".[37] This "effective control" doctrine is inspired by the case law of the European Court of Human Rights but, as argued before, such parallelism is not very convincing taking into account that the Charter does not include a provision comparable to Article 1 ECHR. Hence, the Advocate General's view that the scope of the human rights impact assessment should be confined to checking compliance with *jus cogens* and *erga omnes* norms as derived from the EU's obligations under international law seems to deny the role of the Charter of Fundamental Rights in the EU legal order.[38]

In its appeal judgment, the Court of Justice did not explicitly engage in the discussion regarding the extraterritorial application of the Charter. In contrast to the General Court, it concluded that the Association Agreement and the ensuing agreement on the liberalisation of trade in agricultural products did not apply to the Western Sahara, implying that the Polisario Front had no standing to seek the annulment of the decision at issue.[39] Significantly, the Court of Justice based its reasoning on the principle of self-determination, which it defined as "a legally enforceable right *erga omnes* and one of the essential principles of international law."[40] Proceeding from the application of the principle of the relative effect of treaties of Article 34 of the VCLT, the people of the Western Sahara are defined as a "third party" implying that their consent is needed for the application of the agreement.[41] Without entering into the background and the practical implications of this reasoning,[42] it is sufficient to observe that "the ECJ left the door open for a fundamental rights assessment".[43] In any event, the *Frente*

[36] *Ibid.*, para. 241.
[37] Opinion of Advocate General Wathelet in Case C-104/16 P, *Council v. Front Polisario*, EU:C:2016:677, para. 270.
[38] For a similar view, see: V. Kube, 'The Polisario Case: Do Fundamental Rights matter for EU trade policies?', https://www.ejiltalk.org/the-polisario-case-do-eu-fundamental-rights-matter-for-eu-trade-polices/.
[39] Opinion of AG Wathelet in Case C-104/16 *Council v. Front Polisario,* EU:C:2016:677, para. 49.
[40] Case C-104/16 P *Council v. Front Polisario,* EU:C:2016:973, para. 88.
[41] *Ibid.*, para. 106.
[42] See: G. Van der Loo, 'The Dilemma of the EU's Future Trade Relations with Western Sahara: Caught Between Strategic Interests and International Law?', CEPS Commentary, 20 April 2018.
[43] Kube (n. 38).

Polisario case revealed the significance of fundamental rights considerations in relation to the CCP.

Finally, it is noteworthy that in *Opinion 1/17*, both the Council and several Member States contested the applicability of the EU law principle of equal treatment (Articles 20 and 21 of the Charter) and the right of access to an independent tribunal (Article 47 of the Charter) in relation to the Comprehensive Economic and Trade Agreement with Canada (CETA).[44] The Court of Justice used this opportunity to stress, once again, that "international agreements entered into by the Union must be entirely compatible with the Treaties and with the constitutional principles stemming therefrom."[45] Taking into account that the Charter of Fundamental Rights has the same legal value as the treaties, as expressed in Article 6 (1) TEU, it logically follows that the EU's trade agreements must be fully compatible with the Charter. Of course, certain Charter provisions have a limited personal scope of application. This is, for instance, the case with Article 21 (2) of the Charter, which explicitly provides that the prohibition of discrimination on grounds of nationality shall be prohibited "within the scope of application of the Treaties". As can be derived from the Explanations relating to the Charter, this corresponds to the first paragraph of Article 18 TFEU and is, therefore, limited to situations involving EU Member State nationals. As a result, Article 21 (2) of the Charter is of no relevance in relation to the question of potential discrimination between nationals of the Member States and those of third countries.

Significantly, the non-application of Article 21 (2) CFR does not affect the applicability of other provisions of the Charter which do not have a similar limitation and are, therefore, applicable to all situations governed by EU law, including those falling within the scope of international agreements entered into by the EU.[46] This is, for instance, the case with Article 20 of the Charter, which provides that "everyone is equal before the law". This implies that the Court may be called to examine whether an agreement which leads to a difference in treatment within the Union between third country nationals and Member State nationals is contrary to Article 20 CFR.[47]

Fundamental rights concerns may not only relate to the material provisions of international agreements, but may also arise in relation to the established procedures for dispute settlement. For instance, in *Opinion 1/17*, Belgium raised a question concerning the compatibility of the Investor-State Dispute Settlement (ISDS) mechanism under the CETA with

[44] Opinion 1/17 (*CETA*), EU:C:2019:341, para. 81 and 87.
[45] *Ibid.*, para. 165
[46] *Ibid.,* para. 171.
[47] *Ibid.,* para. 172-175.

Canada with the fundamental right of access to an independent tribunal, as enshrined in Article 47 CFR. The Belgian government expressed its concern about the difficulties for small and medium-sized enterprises to obtain access to the CETA Tribunal given the high cost of such a dispute settlement procedure. In addition, uncertainties about the remuneration, appointment procedures, conditions for removal and the applicable rules of ethics for the Members of the CETA Tribunal and Appellate Tribunal all required an interpretation in light of Article 47 CFR. In this respect, the Court quickly rejected the argument put forward by the Council and the Member States that the Charter is inapplicable in relation to the envisaged ISDS mechanism. Whereas it is uncontested that the Charter is not binding for a non-Member State, in this case Canada, the Charter is binding for the Union. As a result, the Union cannot enter into an agreement that establishes judicial bodies that can issue binding awards and deal with disputes brought by EU litigants if the safeguards foreseen in the Charter are not guaranteed.[48]

As a result, the Court assessed the compatibility of the CETA ISDS mechanism with the requirements of accessibility and independence as derived from Article 47 CFR. As far as the requirement of accessibility is concerned, the Court found that the financial cost could deter natural persons or small-sized enterprises from initiating proceedings before the CETA Tribunal and that the CETA did not contain legally binding commitments to address this problem.[49] The agreement only provides that the CETA Joint Committee 'may' take decisions and 'consider' additional rules to reduce the financial burden for natural persons or small-sized enterprises. However, the Court pointed at the crucial role of Statement No 36, which implies a commitment of the Commission and the Council to tackle the financial accessibility of the CETA Tribunal even if the CETA Joint Committee would not be able to adopt the necessary additional decisions.[50] Without elaborating upon the legal nature of this statement, which was adopted on the occasion of the adoption by the Council of the decision authorising the signature of CETA,[51] the Court simply concluded that this commitment "is sufficient justification, in the context of the present Opinion proceedings, for the conclusion that the CETA, as an 'agreement envisaged', within the meaning of Article 218(11) TFEU, is compatible with the requirement that those tribunals should be accessible." [52]

[48] *Ibid.*, para. 192.
[49] *Ibid.*, para. 211-216.
[50] *Ibid.*, para. 217-218.
[51] See: Council of the EU, Statements and Declarations entered into on the occasion of the adoption by the Council of the decision authorising the signature of CETA, doc. 13463/1/16, 27 October 2016.
[52] Opinion 1/17 (*CETA*), EU:C:2019:341, para. 219.

Whereas it may well be argued that the Statement does not involve any hard legal guarantee but only a political commitment on behalf of the EU institutions, the Court defended its approach by pointing at the close connection between the financial accessibility of the CETA dispute settlement mechanism and the conclusion of the CETA.[53] In particular, the Member States can consider the progress regarding the review of the dispute settlement mechanism as part of their national ratification process. Taking into account that the Council only adopts the decision concluding the agreement after the ratification by all Member States, there is thus a strict political control on the implementation of the commitments laid down in Statement No 36. This line of reasoning allowed the Court to confirm the compatibility of the envisaged agreement with Article 47 Charter. Of course, in principle, there is still a possibility of *ex post* judicial review under the form of an action for annulment against the Council decision concluding the agreement, should there be any issues regarding the accessibility to the CETA Tribunal after the entry into force of the agreement. Taking into account the absence of explicit legal guarantees in the agreement and the essentially political control mechanism on the implementation of the commitment to reduce the financial burden of accessibility for natural persons and small-sized enterprises, such an option cannot be totally excluded when the envisaged initiatives of the CETA Joint Committee or the Commission and the Council would not lead to any concrete results.

Finally, as far as the condition of independence of the CETA Tribunals is concerned, the Court applied its two-prong approach as defined in relation to the EU's domestic legal order.[54] This involves an external dimension, which implies that a judicial body is to function autonomously without being subject to any external interventions or pressure, and an internal dimension, implying the maintenance of an equal distance from the parties to the proceedings and the absence of any personal interest of the judges in the outcome of the proceedings.[55] With respect to the external dimension, the Court recalled that the CETA Joint Committee, which plays a key role in the appointment, removal and remuneration of members of the CETA Tribunals, cannot affect the handling of disputes under the ISDS mechanism. Moreover, the EU's consent to any decision of the CETA Joint Committee has to comply with EU primary law, including the right of an effective remedy enshrined in Art. 47 CFR.[56] As far as the internal dimension is concerned, the Court concludes that the CETA provisions about the composition of the Tribunal as well as the references to the International Bar Association (IBA) Guidelines

[53] *Ibid.*, para. 221.
[54] See e.g. Judgment of 25 July 2018, *Minister for Justice and Equality*, C-216/18 PPU, EU:C:2018:586.
[55] Opinion 1/17 (*CETA*), EU:C:2019:341, para. 202-203.
[56] *Ibid.*, para. 237.

on Conflicts of Interest in International Arbitration are sufficient to satisfy the requirement of independence.[57]

4. The Practice of Human Rights Clauses and Social Norms in EU Free Trade Agreements and the Challenge of Enforcement

Apart from the evolving practice of human rights impact assessments and the external implications of the Charter of Fundamental Rights, which may be directly attributed to the new legal and political framework of the Lisbon Treaty, the trade-human rights nexus is also visible through the inclusion of human rights clauses and social norms in EU Free Trade Agreements. Whereas this practice pre-dates the entry into force of the Lisbon Treaty,[58] some significant developments can nevertheless be observed.

First, in light of the Treaty objectives defined in Articles 3 (5) and 21 TEU, the inclusion of human rights clauses and social norms in FTAs is no longer a matter of foreign policy choice.[59] Rather, it is the expression of a constitutional obligation to ensure that the EU's external action respects the "principles of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and […] the principles of the United Nations Charter and international law."[60]

Second, in line with the well-established pre-Lisbon practice, international agreements concluded on behalf of the Union generally include an "essential element" clause in combination with a "non-execution" (suspension) clause as an expression of the parties' commitment to respect core common values. The drafting of the respective clauses gradually developed over time and typically includes references to democratic principles, human rights and fundamental freedoms and the rule of law.[61] Whereas the EU only uses this form of human rights conditionality in very exceptional circumstances (such as a *coup d'état*), it is noteworthy that the post-Lisbon practice increasingly uses the essential element clause as a

[57] *Ibid.*, para. 238-244.
[58] On the pre-Lisbon practice, see e.g. E. Fierro, *The EU's Human Rights Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff, 2013) and L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP, 2015).
[59] L. Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements', *Legal Issues of Economic Integration* (2013) 40 (4), p. 311.
[60] Art. 21 (1) TEU.
[61] N. Hachez, 'Essential Element Clauses in EU Trade Agreements Making Trade Work in a Way That Helps Human Rights?', Leuven Centre for Global Governance Studies, Working Paper No. 158, April 2015.

normative framework for a positive and institutionalised dialogue on political reform in a partner country which underpins all instruments – including trade instruments – deployed by the EU.[62]

Third, the EU's post-Lisbon trade agreements all include a chapter on Trade and Sustainable Development (TSD) with references to labour and environmental standards that are based on multilateral instruments such as Conventions of the International Labour Organisation (ILO) and the United Nations Convention on Climate Change. Whereas such references were already included in pre-Lisbon trade agreements, the new generation of trade agreements are more explicit in their sustainable development objectives.[63] Moreover, as observed in *Opinion 2/15*, TSD chapters now fall within the scope of the EU's exclusive competence in relation to the CCP.[64] In other words, making the liberalisation of trade relations with a third country subject to the condition of the parties' compliance with international obligations concerning social protection of workers and environmental protection is a logical consequence of the post-Lisbon orientation of the CCP.

Significantly, there is a certain overlap between the social norms included in the TSD chapter and the protection of human rights in the sense that core labour standards as defined within the framework of the ILO are also human rights which the parties are deemed to respect under the human rights clause.[65] In this respect, it is noteworthy that the EU-Korea FTA, which has been used as a template for other FTAs, identifies four "fundamental rights" which the parties promise to respect: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation. Moreover, they commit themselves "to make continued and sustained efforts" towards ratifying the fundamental ILO Conventions.[66]

A recurring criticism concerns the weak enforcement mechanisms in relation to human rights clauses and social norms in EU free trade agreements[67].[68] The monitoring of implementation of the relevant commitments is essentially based on dialogue and cooperation without a possibility to use the normal dispute settlement procedures. The TSD

[62] N. Ghazaryan, 'A New Generation of Human Rights Clauses? The Case of Association Agreements in the Eastern Neighbourhood', *European Law Review (*2015), p. 391-410.
[63] On the nexus between trade and sustainable development, see also chapter XXX in this Volume.
[64] Opinion 2/15 *(Singapore FTA*), EU:C:2017:376, para. 141-167.
[65] L. Bartels (n. 59), p. 312.
[66] Art. 13.4 (3) of the EU-Korea FTA (OJ 2011, L 127/62).
[67] On this issue, see also Chapter X in this Volume.
[68] C. Gammage, 'A Critique of the Extraterritorial Obligations of the EU in Relation to Human Rights Clauses and Social Norms in EU Free Trade Agreements', *Europe in the World: A Law Review* (2018) 2, p. 1.

chapters generally provide for the establishment of a specialised Committee with senior officials from the respective parties, accompanied by a civil society mechanism that may take the form of a Domestic Advisory Group. Disputes are to be resolved within a system of consultations with a possible referral to a Panel of Experts. This panel has the power to draw up a report and to make non-binding recommendations for the solution of the matter. It has been argued that this soft approach is one of the main weaknesses of the EU's trade-human rights nexus.[69] Without a more robust and formal dispute settlement mechanism, the effectiveness of including human rights clauses and social norms in EU free trade agreements remains questionable.

A look at the available *ex post* impact assessments seems to confirm the rather weak enforcement of human and labour rights.[70] The report on the EU-Mexico FTA found that "the commitments to human rights in the agreement still lack effective mechanisms through which human rights could be better monitored or defended".[71] The evaluation report of the implementation of the EU-Korea FTA bluntly concluded that "the EU-Korea FTA is assessed to have not changed the status quo of human and labour rights in Korea as they were when the FTA came into effect, in the sense that little change (positive or negative) over the 2011 situation and/or longer term trends can be observed."[72] However, it would be too easy to reduce the soft approach to an exercise of mere window dressing without any concrete implications. A good example is the EU's initiative to request, for the very first time, formal consultations with the Republic of Korea in relation to the country's non-compliance with international labour standards as defined in the TSD chapter of the EU-Korea FTA.[73] This initiative, which was launched in December 2018, reveals a more assertive approach on behalf of the EU and a clear willingness to use the available mechanisms under free trade agreements in order to ensure compliance with standards that go beyond the traditional scope of international trade relations.[74] Significantly, this approach seemed to produce some effect in

[69] *Ibid.*

[70] The ex-post evaluations are available at the website of the European Commission, DG Trade: http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/ex-post-evaluations/.

[71] Ex-post Evaluation of the Implementation of the EU-Mexico Free Trade Agreement, February 2017: http://trade.ec.europa.eu/doclib/html/156011.htm, p. 161.

[72] Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea, May 2018, p. 244 available at: http://trade.ec.europa.eu/doclib/html/157716.htm.

[73] Request for consultations by the European Union: http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157586.pdf.

[74] In this respect, it is noteworthy that adopting a more assertive approach towards the enforcement of commitments made under the TSD chapters was one of the recommendations included in a non-paper of the Commission services in February 2018, entitled 'Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements'.

the sense that the Korean government announced the objective to ratify three key ILO Conventions by the end of 2019.[75]

5. Conclusions

The constitutionalisation of the trade-human rights nexus with the Treaty of Lisbon influences the law and practice of the CCP in several aspects. Most notably, it resulted in the adoption of new policy frameworks and strategies ensuring the mainstreaming of human rights considerations in all EU external policies, including the CCP. Of particular significance is the inclusion of human rights impact assessments for trade-related policy initiatives. As observed by Advocated General Wathelet in the *Frente Polisario* case, "the Council and the Commission have set the bar very high for themselves".[76] The discussion surrounding the absence of a prior impact assessment for the conclusion of the FTA with Vietnam and the critical remarks of the European ombudsman in this respect, as well as the *Frente Polisario* case reveal the political and legal significance of human rights impact assessments in relation to the conclusion of international trade agreements.

Whereas there is a general consensus that the EU must take into account fundamental rights in its external action, the precise implementation and operationalisation of these duties remains subject to discussion.[77] The increased attention to human rights as a "founding value" (Article 2 and 3 (5) TEU), "guiding principle" (Article 21 (1) TEU) and "objective" (Article 21 (2) (b) TEU) implies at least a duty to put human rights on the agenda of trade negotiations. Arguably, it involves certain procedural obligations such as conducting human rights impact assessments prior to concluding trade agreements, ensuring that adequate monitoring mechanisms are in place and establishing accountability mechanisms.[78] The effectiveness of EU human rights conditionality in external trade instruments is yet another discussion which largely depends upon a variety of factors such as the integration of trade instruments in a broader human rights agenda, the position of third countries and the interests of the various actors and institutions.[79] **Bibliography**

[75] Kim Hyun-Bin, 'Gov't aims to ratify 3 key ILO Conventions within this year', *Korean Times*, 13 June 2019: http://www.koreatimes.co.kr/www/nation/2019/06/371_270584.html.
[76] Opinion of Advocate General Wathelet in Case C-104/16 P, *Council v. Front Polisario*, EU:C:2016:677, para. 263.
[77] O De Schutter *(*n. 19).
[78] Kube *(*n. 25), p. 28.
[79] See e.g. L. McKenzie and K. L Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: The Case of the EU Singapore FTA", *Journal of Common Market Studies* (2017), p. 832-849; S. Velluti, 'The Promotion and Integration of Human Rights in EU External Trade Relations', *Utrecht Journal of International and European Law* (2016), p. 41-68.

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